

02-05 MO 1 Example 1

1. Equitable relief is available in this situation. Equitable relief is available if the legal remedy is inadequate & if enforcement is feasible.

A legal remedy is inadequate if you are dealing with a unique or rare item, if damages are speculative, if a person would be exposed to multiple lawsuits, or if the other party is insolvent.

To obtain equitable relief, enforcement of the judgment must also be feasible. The court must be able to enforce any order it gives.

Equitable relief is always discretionary. One is never entitled to equitable relief.

In this case, the legal remedy is inadequate. Damages (money) cannot fully compensate County because land is involved. Land is always considered unique. Enforcement is probably feasible in this situation. If the court is able to enforce the order it gives, then equitable relief is available in this situation.

2. (a) A preliminary injunction is used to maintain the status quo until the issues for trial can be determined. County must show that they will suffer an irreparable injury if the preliminary injunction is not ordered. County must also show their likelihood of success at a trial for a permanent injunction. The court will hold a hearing for the preliminary injunction, and if County is able to show irreparable injury & their likelihood of succeeding at trial, then the court will issue a preliminary injunction. If the preliminary injunction is ordered, the court will probably make County post a bond in case a permanent injunction is not eventually ordered and Water suffers damages from the preliminary injunction.

2. (b) The court's judgment includes an order for a mandatory injunction and also an order for a negative injunction.

A mandatory injunction is where the court orders a party to do something. In this case, the court has affirmatively ordered water to remove the improvements.

A negative injunction is where the court orders a party to stop doing something. It is where a court orders them not to act. In this case, the court has ordered Water to stop operating the plant.

For equity relief to be granted, enforcement of an order must be feasible. Mandatory injunctions (affirmatively do something) are harder for a court to enforce. Negative injunctions (stop doing something) are easier for a court to enforce from far away.

3. Judgment of the order can be enforced through civil or criminal contempt procedures.

Civil contempt is where a private party brings an action to coerce or compel a party to comply with an order. It can be a \$ fine or jail time, but in civil contempt, the point is NOT to punish, but to coerce & compel the party to comply w/the order. In civil contempt, the party being held in contempt "holds the keys" (by paying fine & complying w/order) to making the contempt order go away.

In criminal contempt, the government brings the action to punish. It can be \$ or jail time, but in criminal contempt, the wrongdoer does not hold the keys to his freedom. It is used to punish the party for not complying w/the order.

02-05 MO 1 Example 2

(1) County's circumstances make it eligible for equitable relief. A plaintiff is eligible for equitable relief when its remedy at law would be inadequate. A remedy at law can be inadequate for various reasons, for example, the defendant is insolvent, money damages would be hard to calculate or inadequate to compensate the plaintiff, the subject matter sought to be protected is unique, and the plaintiff would have to bring repeated lawsuits.

In this case, County's remedy at law is inadequate because the subject matter sought to be protected is land, and land is always considered unique. Once Water changes the character of the land by building the power plant, it would be difficult for County to recapture that land's character.

Moreover, money damages would not compensate County here, because it is the land it wants to preserve.

(2)(a) To secure a preliminary injunction, a plaintiff must prove: (1) Irreparable injury will occur before a trial on the merits can be held; and (2) likelihood of success on the merits. It must also provide Water with notice. To show likelihood of success on the merits, it must show: (a) remedy at law is inadequate, (b) a property right is at stake, (c) enforcement by the court would be feasible, (d) the balance of hardships falls in plaintiff's favor, and (e) no defenses are available to the Defendant.

Here, irreparable injury will occur if Water changes the character of the land before trial on the merits. Also, success on the merits is likely, as the land is a property right, the court can enforce through a negative injunction, the hardship is on the County if it can't enforce its own zoning requirements, and no defenses seem available. Also, County can give Water reasonable notice it is seeking the injunction.

(2)(b) When the court tells Water to close operation of the plant, this is a negative injunction. It is negative because the court is telling the defendant not to do something.

When the court tells Water to remove the improvements, this is an affirmative injunction. It is affirmative because the court is telling the defendant to affirmatively take some action.

(3) The court can enforce its order through a contempt order. There are three kinds of contempt orders: (1) Coercive civil, (2) Compensatory civil, and (3) Criminal. Coercive civil is used to coerce the defendant to comply with a contempt order in a civil trial. Compensatory civil is to compensate the plaintiff when the defendant does not comply. Criminal is used to uphold the dignity of the court by forcing a defendant to comply.

In this case, the most likely enforcement device is a coercive civil contempt citation to coerce Water to comply with the order. Alternatively, it could probably also award compensatory civil to compensate County for Water's non-compliance.

02-05 MO 1 Example 3

Answer to question 1

1. For any equitable relief to be granted, the plaintiff must demonstrate that there is no adequate legal remedy and that equitable relief is feasible in this circumstance. Adequate legal remedies generally involve judgments for money damages, so actions in which money damages are not adequate will be candidates for equitable relief. This generally includes actions involving real property, unique chattels or irreparable harm that cannot be fully compensated by money. Equitable relief may be denied in the presence of a legitimate Equitable Defense. Equitable Defenses include Unclean Hands (when the plaintiff has contributed to causing the harm), Laches (when the suit has been unreasonably delayed to the detriment of defendant), Impossibility/Hardship (when the defendant will not be able to comply or the cost of compliance is larger than the benefit to plaintiff) and First Amendment protections (generally Free Speech protections in defamation, libel and slander actions).

Feasibility involves the ability of the court to enforce the equitable relief sought. Equitable remedies are entirely at the discretion of the court, so the court will not grant ER when it is not within its power to enforce the judgment. These scenarios include defendants not within the state or contracts that require personal taste to be applied for satisfaction of a contract term.

In this fact pattern, the County will be seeking an injunction. The courts generally favor Negative Injunctions, which are orders prohibiting certain conduct or requiring a party to stop certain conduct. Courts may also issue Mandatory Injunctions that require that a party DO some enumerated act, but these are harder to enforce and may run afoul of the 13th Amendment's prohibition on involuntary servitude.

Injunctions are almost always granted in tort claims involving a continuing harm to plaintiff, or to stop ongoing prosecution of a wrongful lawsuit. When stopping a lawsuit, the injunction is an order as to the opposing party, and not to the court in which the suit is being heard. Injunctions are often issued in most other torts if the plaintiff can substantiate that some pending harm will be suffered without the injunction, and that the harm would not be adequately compensated by a legal remedy. Injunctions are rarely issued in cases of defamation, slander or libel due to fears of violating the First Amendment by imposing a prior restraint on protected speech.

2a. A Preliminary Injunction is a temporary injunction that requires certain actions on the part of opposing party during the pending lawsuit. The purpose of a PI is to maintain the status quo while the controversy is being resolved. A PI generally requires a hearing, such as the one in this fact pattern.

To obtain a PI, the plaintiff must show that some irreparable harm will be suffered and that plaintiff is likely to succeed on the merits of the suit. Evidence will be presented as to both points during the hearing and the court will decide whether or not the evidence is sufficient to justify a PI. The plaintiff need not ACTUALLY win the case for the PI to have been validly issued. PIs are an adversarial process requiring notice and participation of opposing party.

A related remedy is the Temporary Restraining Order. Unlike the PI, a TRO may be obtained ex parte if the irreparable harm is imminent and the order must be immediate to prevent it. A TRO in Missouri is only valid for 10 days. Generally, a party obtaining a TRO will then use the 10 days to obtain a hearing and a PI that will last until the end of trial.

2b. The facts as given in this part of the question indicate that the injunction that will be issued will be a Mandatory Injunction. Because the complained of action by defendant is already complete as of the end of trial, the court is effectively ordering defendant to do a new act. In this scenario, the proper course would have been to seek a PI immediately to stop construction (a Negative Injunction). This would have prevented further expenditure by defendant and better maintained the status quo. Under the facts as given, a court should carefully consider a grant of a Permanent Mandatory Injunction due to the Equitable Defense of Impossibility/Hardship. This Mandatory Injunction will cost defendant much more than the plaintiff will receive, making a money damage award or fine a more appropriate remedy.

3. Refusal to obey a court order places the defendant in contempt of court. Since this contempt was not perpetrated against the court in a way that was meant to damage the court's integrity, defendant would be held in civil contempt. Fines can be issued, but no jail time under civil contempt. Since this case involves a public utility, there will be political recourse for County in addition to judicial remedies, so enforcing this injunction in the courts may not be the most effective option.

02-05 MO 2 Example 1

(1) Sister violated her duties of loyalty, management, duty to treat each beneficiary equally.

(A) Duty of Loyalty

Under MO Statutes that pertain to trust a trustee is required to not partake in self dealing as to trustee property. Self dealings occur when trustee purchases trustee property, even at a rate greater than that of fair market value, for trustee's own purpose.

In this case sister breached her fiduciary duty loyalty by committing self dealing when she bought the Trust's farmland for herself for \$1,100 per acre. Therefore sister breached her duty of loyalty.

(B) Duty of Management

Under MO Trust Statutes trustee is required to prudently invest trust property after reasonable research and investigation on the investment. A trustee is prohibited from making rash uninformed decision b/c trustee is required to act w/care in management. W/management duty is also to diversify investment.

In this case sister, as trustee, breached her duty of management when she, without further inquiry or research wired Friend \$1,100,000.00 to invest in a "high risk/high return" venture.

Further, the breach occurred b/c sister should have only invested a portion, if any in such investment b/c she's required to diversify the portfolio. A reasonably prudent investor would not have invested the full proceed amount in the high risk high return venture w/o research on the matter.

Therefore she breached her duty of management, which encompass a duty to diversify the portfolio.

(C) Duty to treat beneficiaries equal.

A Trustee has an affirmative duty to treat all beneficiaries equal unless the trust instrument reveals a different intent expressed by the Settlor.

In this case Sister breached this duty b/c Wife as income beneficiary appears to have been preferred more than Cousin as principle beneficiary. An income beneficiary receives income generated from the trust property (Res). Principle beneficiary receives money from the remainder of the trust after income beneficiary's rights have expired.

In this case it appears Sister diligently provided adequate income for Wife b/c Testator's Trust paid \$100K for 3 years which Sister distributed to Wife. However, at Wife's death, when Cousin is to take the Trust was \$275K, less than amount Trust started w/. Therefore b/c of this disparate treatment and no express intent for such treatment in Trust Instruction Sister has breached.

(2)(A) Duty of loyalty - breach can surcharge, constructive trust.

Under MO Trust Stat. when a Trustee breaches a duty of loyalty the beneficiary can Surcharge, meaning require Trustee to replace property. In addition Beneficiary can invoke equitable remedy of Constructive Trust by show legal remedy inadequate, equitable remedy feasible, property or \$ from property can be traced, and such action is necessary to put beneficiary back in position had Trustee not breached.

(B) Duty to manage & diversify

Beneficiary can employ same technique as above & surcharge for breach in order to force trustee to return \$ (money) to Trust for failure to diversify portfolio & manage as a reasonable investor.

(C) Duty to treat equally

Employ technique of surcharge or for trustee to resign by petitioning the court.

02-05 MO 2 Example 2

1. Sister's failure to sell the farm for \$1,200/acre was not initially a violation of her fiduciary duties Duty of Loyalty to Cousin since she had no obligation to sell but she did violate her fiduciary duties when she bought the land. There is a presumption of violation of fiduciary duties when a trustee is involved in self-dealing. In the case at hand, Sister not only practiced in self-dealing, but paid a lower price than she could have gotten for the land. Sister will argue that the land w/out her farm included is only worth \$1,000 (best offer for trust land alone) but the fact she was offered \$1200/acre, if she included her land and was willing to pay \$1,100 herself, this argument should fail. The appropriate measure of damages would be the difference between the price of the land (\$1,200/acre) and her purchase price (\$1,100/acre) for a price of \$100/acre and a total of \$100,000. In the alternative, the court could also establish a constructive trust for Cousin from Sister's land at this time, requiring Sister to pay Cousin the \$30,000 annual cash rent while running the farm as a construction trust.

The second duty Sister violated was the Duty of due Care. A trustee is expected to make prudent financial decisions while thinking long term for the trust. Although a trustee is not held liable for a bad business decision, there is still a need to make an informed decision. Here, Sister was so happy to hear from friend she wired the money without further inquiry or research. Any trustee business decision should only be made with research, inquiry and general due care as to the investment; Sister did no such thing. In addition, the investment was "high risk/high return" it is never appropriate for a trustee to speculate with trust funds. A high risk/high return investment is speculative and compounds the violation of the duty of care, creating a separate instance of a violation. The nature of the investment (speculative) and the lack of inquiry/research (due care) both are violations of the fiduciary duty. The remedy Cousin should seek is restitution to restore Cousin to his former position. Sister should have to pay Cousin the difference between the current value of the trust (\$275k) and the value it had (\$1.1 million) for a total of \$825k. In the alternative, since the money was lost and Sister may be judgment proof, Cousin can attempt to have a constructive trust created out of the land Sister appropriated (see above) since the annual rent would combine with the land to restore Cousin to the position he should be in.

Finally, Sister violated her fiduciary duty to Cousin as a future interest holder in the trust. Sister distributed 100% of the profits to wife while the money was in the speculative investment.

Although there is always tension between a current trust interest and the future interests, neither should be neglected. The trust was established to insure Wife an income, so she should receive some of the interest to live off of. At the same time, some should be returned to the trust so it can grow and to insure the future interests will be fulfilled. By failing to take Cousin's interest into account and giving Wife all the profits, Sister violated this fiduciary duty to preserve the trust. The appropriate damages here would be difficult to calculate since the tension between the two interests need to be resolved individually. One measure of damages would be to split the profits, but this might not be fair to Wife. As a result the most appropriate remedies overall would either be the difference in value between the original trust (valued at \$1,200/acres per best offer) and the current value of the trust (\$275,000) for a total of \$925,000, although a constructive trust in the land (1000 acres of what is now Sister's farm) and the thirty thousand dollars in annual rents would probably better satisfy testator's intent to care for his favorite cousin. Both remedies are allowed (at separate times, one or the other). A constructive trust would best carry out testator's wishes and it would make Cousin whole again. Money damages would have the same effect, but it is not clear if Sister could pay damages of 1.2 million (initial value) minus 275k (value left) + 300k (pay of wife for 3 yrs.) so the trust is more likely to be of practical value to Cousin.

02-05 MO 2 Example 3

1 & 2. A trustee is under several fiduciary obligations which are: **1. Duty of loyalty, 2. Duty of Care, 3. Duty of Accounting, 4. Duty to Earmark & Segregate Funds, 5. Duty of Impartiality, 6. Duty not to delegate decision making.** If any of these duties are violated, the trustee can be liable for damages to the beneficiaries of the trust.

In the present situation, the trustee violated her fiduciary duties in the following ways:

Duty of Care

The duty of care requires the trustee to invest and look after the res of the trust in the same manner as a **reasonable and prudent investor**. Sister, as trustee, failed to do that when she took the proceeds of the sale of the farm and invested it into the "high risk/high return" venture proposed by Friend. Sister performed no independent investigation of this venture and strictly relied upon the information provided by Friend. Trustees are allowed to rely on reliable information provided by others but in this case, Sister was more interested in renewing her friendship with Friend than in investigating the soundness of this venture.

Sister is liable to both Wife and Cousin for this breach in damages. Sister had a duty to protect the res for Cousin who was the remaindermen and to insure an income for Wife who was the life beneficiary of this trust.

Duty of Impartiality

The investment into Friend's joint venture also was a violation of Sister's duty of impartiality. Sister had a duty to both protect the res of the trust for future disbursement to Cousin (the remaindermen who had a future interest) and to insure an income to Wife (the life beneficiary). Sister violated this by investing in a high risk/high reward venture with Friend. The duty of impartiality was violated because Sister risked the principal of the res which was to eventually go to Cousin for the short term benefit of Wife.

Not only did Sister violate the duty of impartiality with respect **favoring Wife's interest over Cousins** but she did so as well as in using her power as trustee to renew a friendship with Friend by investing in Friend's proposed venture. The use of investment funds to further Sister's own agenda was a blatant violation of this duty because she strictly invested to promote a friendship with Friend.

Trustee would be liable in damages to Wife and Cousin on account of this breach.

Duty of Loyalty

Sister possibly violated the duty of loyalty with respect to the sale of the farm. While the trust didn't prohibit the sale of the farm, and it appears to be within Sister's authority to do so, she was required to do so prudently and in a commercially reasonable manner. Sister turned down an offer of selling the trust property and her own for \$1,200/acre which was within her right because the buyer was only offering \$1,000/acre for the trust farm and Sister was under no obligation to sell her own land to procure a better price for the trust farm. On the other hand, Sister's buying the trust property herself is suspect. The trust was generating \$30,000/year which was income that would be paid to Wife. Sister had no reason to sell the farm and only made a few month search for a possible buyer. When none presented themselves, Sister bought the land herself for \$1,100/acre. While at the time, this was the best price available for the land, it would have been prudent for Sister to perform a more thorough search then to engage in what might be viewed as a **self-dealing transaction and therefore a breach of the duty of loyalty.**

Trustee would be liable in damages to Wife and Cousin on account of this breach. The beneficiaries of this trust could impose a **constructive trust or equitable lien** on the land.

Remedies

The beneficiaries of the trust have, for all the violations by Sister, have the right and opportunity to ratify each and every transaction. They can choose to ratify the transactions that were profitable and seek damages from the trustee for the transactions that were unprofitable. Furthermore, Sister, as trustee, is **not entitled to offset** of the profitable against the profitable transactions.

02-05 MO 3 Example 1

(1) She should appeal the denial of temporary maintenance now. Temporary maintenance, if granted, is only used to the extent a spouse needs it to meet her reasonable needs. By delaying an appeal, the argument that she doesn't need maintenance is strengthened. Additionally, a spouse requesting or receiving maintenance is under an ongoing duty to find employment to meet his or her own reasonable needs. Husband could argue Wife's delay shows she has failed to attempt to seek employment. Wife would need to show temporary maintenance is needed until she finds a job.

(2) Such an argument will probably be unsuccessful. Maintenance decisions consider the length of the marriage, the income of both spouses, the division of the marital assets, the health of both spouses, and the employability of both spouses.

The fact that the marriage has only lasted four years and Wife's nursing qualifications alone cut against a finding for temporary maintenance. Wife is in good health and no facts indicate she would be unable to find a job.

At the July 1, 2004 hearing, Wife admitted that Husband has been paying her \$2,500 a month since separation. The sale of the house netted \$400,000 for each spouse while the house was a marital asset, the sale proceeds are now separate assets. No rule prevents a spouse from using former marital assets to support herself.

Wife purchased a house, a \$50,000 pool, and \$40,000 for landscaping. Maintenance is only given for reasonable needs, not to cover every expense. Since the marriage was short, Wife can be employed as a nurse, and Wife is spending beyond her reasonable needs, such an argument would not succeed. Wife would need to show temporary maintenance is needed until she finds employment.

(3) Wife must prove she would be unable to provide for her own reasonable needs. Under these facts, permanent maintenance would not be granted. While lifestyle can be an issue, length of marriage cuts against it. Since they were only married for four years, their lavish lifestyle will not be much of a factor. Wife did not work during marriage, but she is only 30 and was a nurse. Since the marriage was short and she should be able to find employment, permanent maintenance will be denied.

02-05 MO 3 Example 2

1) Wife may appeal the denial of temporary maintenance, in fact she should. Normally a judgment that is not final is not appealable unless there is a very important interest or question of law at stake and the court certifies that it may be appealed. However, orders for temporary maintenance are appealable and Wife should appeal within 30 days. Wife should not wait until the end of the dissolution because then the court will order the order of dissolution that will include any maintenance. Temporary maintenance will be irrelevant at this point because temporary maintenance is awarded so that the spouse may be provided for during dissolution. That is why the order has to be appealed now instead of waiting.

2) W will not be successful on this point. The court will look at the same factors it looks at in ordering permanent maintenance as it does in temporary maintenance. The court looks at the age of the parties, the length of the marriage, the employability of the parties, the separate assets of the parties, the income of the parties, who children (if any) are staying with, the conduct of the parties, and if any parties have dissipated assets, and can Wife reasonably meet her needs.

Here the parties were not married for very long, the wife is only 30 years old, and she had been employed as a nurse. The court will also look at the fact the parties sold the marital home and split the proceeds evenly. This is evidence of intent to treat the \$400,000 each received as separate property (because no separation agreement and dissolution was not final, property is still marital. Wife bought a 5000 square foot home and spent \$50,000 on a pool and \$40,000 on landscaping. If the court treats the proceeds from the sale of the home as marital property, wife has probably dissipated assets. If treated as separate property, it is evidence she could reasonably support herself. When combined with other factors such as age, employability, and length of marriage, it is likely a court will deny the appeal. The fact Husband and Wife agreed she would not work will not change this because she is so young and could go back to nursing. Husband has also been paying all her expenses and giving \$2500 a month in cash. Most important, Wife can reasonably meet her own needs.

3) Wife will have to prove she can not reasonably meet her needs. The court will look at many of the same factors as it would in question #2. The court will look at age, employability, income, and separate assets of the parties. The court will also look at the length of the marriage and the conduct of the parties.

Here the wife is 30 yrs old, was employed as nurse within the last 4½ yrs., the marriage was short, and the wife has substantial assets in \$400,000 she received from sale of marital home. Further if this \$400,000 is treated as marital property she has likely dissipated.

The main test is whether Wife can reasonably meet her own needs and in light of all the factors discussed above, the court will likely find that she can and deny permanent maintenance.

02-05 MO 3 Example 3

Answer to question 3

1) Wife can appeal the temporary maintenance order now. If it is inadequate to meet the wife's needs, she should appeal immediately. The temporary maintenance order is to provide for maintenance until a more permanent amount is set. It is temporary, and if she is not able to live on the amount ordered, she should appeal. Generally, only final orders are appealable in Missouri civil procedure, but wife is permitted to appeal an award of temporary maintenance. Once the permanent amount is set (or refused), then that permanent maintenance would be the issue decided on appeal. Presumably, wife would have already lived through the time for temporary maintenance, and this would not be available on appeal. The wife should not wait.

2) It is unlikely this argument will be successful on appeal. Wife is not entitled to preserve her marital property when just to feed her exorbitantly high living standards. Husband is already providing voluntary money to wife and paying her expenses. If she chooses to live at an exorbitantly high standard with pools and quite expensive homes, it is not the other spouse's responsibility to pay for this. The marital property should be preserved and Wife is not entitled to use or deplete this property for lavish purchases. The factual determination that wife possessed sufficient property to meet her needs was certainly reasonable and will not be reversed on appeal. The appellate court will give deference to this very reasonable decision of the lower court. If wife spends within reason, the marital property would not be used, and wife is not entitled to spend lavishly to deplete the marital property. Wife will lose the appeal.

3) Wife should not be entitled to an award of permanent maintenance.

Maintenance is available to a spouse and to determine what, if any, maintenance is appropriate the court looks at a number of factors. Included in this list of factors is the length of the marriage, how the couple was living previously, the needs of the couple when they are now living on their own, their ability to provide for themselves, reason for the divorce, contribution and sacrifices to the marriage, and ability of spouse to pay other spouse. Wife must certainly show "need" in order to receive maintenance, and that appears lacking given the facts of this case.

In this case, the marriage was short, only four years. While the couple lived life to a very high standard, this factor is reduced by the short duration of the marriage. Wife did not sacrifice much

during the marriage. Although she quit her job, there was no indication this was required for the care of children or necessary or demanded by husband. Moreover, wife is healthy and appears more than skilled and capable (employed previously as a nurse) to work. She is voluntarily not working, and if she chooses this voluntary action she is not entitled to have the husband pay for her lavish living. Wife is capable of employment, and a nurse receives generally good pay. She is not supporting anyone but herself and given the short duration of the marriage, wife should not be entitled to permanent maintenance. While the husband may have an ability to pay, the wife is not entitled to the husband's maintenance after the divorce given her needs and the short duration of the marriage.

02-05 MO 4 Example 1

(1)(a)

Using the secretary's affidavit, Dependable should file a motion for summary judgment before trial. Summary judgment should be granted where the pleadings, affidavits, and admissions on file show there is no genuine issue as to any material fact, and that the Movant is entitled to judgment as a matter of law.

A proper motion for summary judgment should consist of undisputed material facts set forth in separate paragraphs with citation to relevant portions of the record. Supporting discovery materials should be attached. A memorandum of law in support should normally be filed contemporaneously with the motion.

Upon filing a properly supported motion for summary judgment, the nonmoving party cannot simply rest on its pleadings, but must come forth with counter affidavit or other material showing a genuine issue of material fact or that the law does not support summary judgment.

(b) Paul should argue that the court should strike and not consider the secretary's affidavit because it is based on rumor, and not the personal knowledge of the affiant. Also, because it is based on hearsay, it does not contain admissible facts. Finally, there is nothing to indicate the secretary's competency to testify.

(2) The court should deny Dependable's motion. Following the dismissal without prejudice, under the MO savings statute, Plaintiff had one year to refile the action. The savings statute has the effect of tolling the SOL for 1 year.

(3) Middleman is not required to assert its claim for purchase price in Paul's lawsuit under the doctrine of compulsory counterclaim. Because the purchase of the tractor is a separate transaction or occurrence from the accident giving rise to Paul's product liability, Middleman is permitted to bring a counterclaim for the purchase price, but is not required to do so.

(4) Paul should argue the MO long arm statute applies to give MO PJ over Dependable because it transacts business in MO in that it knows its machinery is regularly sold in MO. Furthermore, Paul should argue Dependable committed a tort causing an injury in MO.

Dependable's due process argument should fail because Dependable purposefully availed itself to jurisdiction of MO courts by manufacturing farm equipment it knows or should know will be purchased or operated in MO. Therefore, it is reasonable to expect that Dependable would be subject to jurisdiction of MO courts. Traditional notions of fair play and substantial justice are not offended by MO courts exercising PJ over Dependable. Dependable has the minimum contacts w/MO to survive a constitutional challenge to jurisdiction under the due process clause.

02-05 MO 4 Example 2

I (a) Dependable should file a motion for summary judgment. Summary judgment should be awarded when there is no genuine issue of material fact, entitling the movant to a judgment as a matter of law. In making its determination, the court should consider all facts in a light most favorable to the non-moving party, granting it the benefit all reasonable inferences. The Plaintiff must be able to clearly prove element of its case and disprove every element of any affirmative defense submitted by the defendant.

(b) An affidavit should not be considered unless the affiant is competent to testify is testifying to relevant information, and is testifying to admissible evidence. Here, Paul should argue that the affidavit is insufficient to satisfy a motion for summary judgment for two reasons. First, it contains inadmissible information because it is based on a rumor making it speculative and hearsay. Second, because it is merely based on a rumor, there is cause to believe reasonable minds could disagree as to whether the tractor was altered. At most, that is a factual dispute to be decided by a jury or other fact finder.

II. The court should allow Paul to refile his lawsuit. Although Paul originally filed before the original five year deadline, he later withdrew his claim in a voluntary non-suit. Although he refiled at a date that would have been banned by the original statute of limitations, his suit will be saved by Missouri's one year Safe Harbor Statute. This statute allows claims dismissed without prejudice to be refiled within one year, even if that would place them past the original statutory limitation. Note that for this rule to apply, Paul must have withdrawn his suit before the jury was sworn in for voir dire (or before the first witness was sworn for a judge-tried case).

Because Paul met the original statute of limitations and because he refiled within one year of the dismissal (nine months), Missouri statute will save his cause of action.

III. Middleman will not be required to assert its claim for the purchase price of the tractor in Paul's lawsuit. Compulsory counterclaims are those that must be asserted by a defendant in the Plaintiff's claim. Compulsory counterclaim arise when the defendant's claim arises out of the same contract, transaction, or occurrence of the Plaintiff's claim. However, a voluntary counterclaim entails all other unrelated claims that the defendant may have against the plaintiff. The judge may permit those at his discretion, and they may be filed at a separate time and in a separate if the defendant so choses.

Here, Middleman's claim is based on contractual principals that have nothing to do with the events that gave rise to Paul's claim in tort. Paul's claim rose from M's negligent tortious contract in altering the tractor, and it accrued when the tractor injured him. Middleman's claim, on the other hand, arose from a separate transaction – the agreement/contract that took place before Paul's injury and which was not connected to it in anyway. Therefore, Middleman need not assert its claim in Paul's lawsuit.

IV. Paul should argue that Missouri has long arm jurisdiction over Dependable because Dependable established minimum contacts with Missouri and because Missouri's long arm statute encompasses Dependable's conduct. Missouri's long arm statute grants it jurisdiction over claims of business arising in Missouri, contracts agreed upon in Missouri, torts in Missouri, Missouri real estate, insuring a Missouri risk, an act of sex that has occurred near the birth of a child in Missouri, and Missouri marriages. Paul may argue that Dependable practiced business in Missouri and committed a tort Missouri. He must also argue that his damages arose from Dependable's Missouri contacts. Because Dependable works closely with Middleman, who he knows regularly sells equipment used in Missouri, and who actually shipped the tractor to Paul, Dependable cannot be said to have merely released the tractor into the stream of commerce. It did knowingly did business with a Missouri resident. Note, however, that Paul's tort claim is weaker, because Dependable's alleged tortious conduct transpired in Kansas even though Paul was injured in Missouri.

The jurisdiction is otherwise constitutional because Dependable purposely availed itself of Missouri's benefits

by working closely with a business who shipped Paul's tractor to him in Missouri, using Missouri roads and protections. This contact was proximately caused by Dependable's business practices and was not the result of a unilateral act of another party. He made the decision to do business in this manner. Further, since Kansas is nearby and because Dependable has demonstrated its ability to do business in Missouri, the forum is not unreasonable. The court will consider the nature and quality of Dependable's contacts, the relationship between the cause of action and the state, the quality of contacts, Missouri's interest in the litigation, and convenience to the parties. These are all satisfied and the court should reject Dependable's argument.

02-05 MO 4 Example 3

1. a.) Using Secretary's affidavit.

Using Secretary's affidavit Dependable should file a motion for Summary Judgment. Dependable as defendant can file a motion for summary judgment at any time.

Summary judgment is appropriate if there are no issues of material fact and the moving party is entitled to judgment as a matter of law. A material fact is one that bears upon the litigation and is required for its resolution; not just an issue of any fact.

A court examines the motion for summary judgment, supporting documents and evidence including affidavits in the light most favorable to the nonmoving party. The nonmoving party has burden of showing facts which are material and in dispute by providing evidence, not just relying on allegations in pleadings.

1. b) Paul should argue that the affidavit be struck because it is based on and contains hearsay as to the relevant, material issue.

An affidavit submitted with a motion for summary judgment must be sworn to and based on personal knowledge so that it is admissible as evidence. An inadmissible affidavit is disregarded by the court for summary judgment.

Here the secretary's affidavit alleges she heard a rumor about Middleman's subsequent work on the tractor. As the rumor is hearsay, it is inadmissible in the affidavit and not included for summary judgment.

Her info could be used for discovery purposes.

2) The court should dismiss Dependable's motion because under Missouri law, a case can be refiled within one year after dismissal without prejudice and relate back to the first filing date.

Here Paul filed the first action w/i the appropriate 5 year statute of limitations (5 yrs for torts not otherwise provided for by statute).

A case dismissed without prejudice either involuntary or voluntary can be refiled within one year and relate back to original petition filed within the statute of limitations period.

Here Paul's refiling was within the one year period and relates back.

3. Yes, Middleman is required to assert claim for unpaid purchase price as compulsory counterclaim.

Compulsory counterclaims are claims related to same transaction or occurrence. This is done to keep case together and get total relief and finality to all parties involved.

Here bought the tractor but did not pay the full price and still owes Middleman. Paul was then injured by tractor that Middleman sold. The unpaid price could be used to offset damages to Paul as it all arises out of tractor transaction and occurrence, which can be sequence of events, it is best brought as counterclaim this case.

4. Personal jurisdiction is proper and motion should be denied.

Missouri long arm statute grants Missouri personal jurisdiction over a defendant who transact business or in which a defendant's product cause tort in the state.

Here Dependable transact business in Missouri and its tractor was involved in tort in Missouri.

In addition to Missouri long arm statute, personal jurisdiction must meet due process/const requirements. It must comport with traditional notions of fair play and substantial justice Int'l Shoe.

In order to do that the defendant must have such minimum contacts that show purposeful availment with the forum so that it could foresee action in the forum or seek protection of the forum.

Here Dependable knows that its tractors end up in Missouri. In fact many tractors have been sold to MO residents and Dependable knows this. This gives such systematic and continuous contacts that personal jurisdiction would not violate due process.

Finally, Dependable has to have notice. The facts indicates it was served thereby providing notice.

With its contacts and notice, personal jurisdiction over Dependable does not violate due process.